MOTION FILED

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No. 97-1868

In The

Supreme Court of the United States

October Term, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JOHN E. WARD,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF FOR THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Association of California Life and Health Insurance Companies ("ACLHIC") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this *amicus curiae* brief. Counsel for respondent has not consented to the filing of this brief.

ACLHIC is a non-profit association whose members are domestic California life and health insurance companies and foreign life and health insurance companies which do business in California. One of the primary purposes of ACLHIC is to represent the interests of its members and their policyholders in substantial public policy matters which affect them. ACLHIC has participated as *amicus curiae* in other federal cases for this purpose. ACLHIC has a duty to promote the solvency and efficiency of its members and of the soundness of the products they issue.

In the instant case, ACLHIC has a substantial interest in insuring the efficient administration of life and health insurance policies issued to employee benefit plans subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1001, *et seq.* The interposition of disparate state common law rules of general application, such as the California notice-prejudice rule, in the administration of such plans is contrary to the express terms of ERISA and of prior decisions of this Court. The application of such rules to ERISA plans generally will

result in inefficient state-by-state benefit determinations, to the detriment of participants, beneficiaries, plan sponsors and service providers such as the members of ACLHIC. Moreover, the particular common law doctrine in question here – the California notice-prejudice rule – would unpredictably extend liability for tardy claims, prevent the reliable closing of annual records and provide disparate benefits to plan beneficiaries who reside in different states.

ACLHIC is familiar with the questions involved in the case and the scope of their presentation. ACLHIC believes that additional argument should be presented on one aspect of the legal analysis of the decision below. While petitioner has fully analyzed and briefed the legal issues presented, additional briefing by ACLHIC will assist the Court by demonstrating the errors of law of the decision below.

It is therefore respectfully requested that the motion of ACLHIC for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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July 20, 1998

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INTEREST OF THE AMICUS

The Association of California Life and Health Insurance Companies ("ACLHIC") is a non-profit association whose members are domestic California life and health insurance companies and foreign life and health insurance companies which do business in California. Its interest in the issues presented by the petition is substantial and directly affect its members for the reasons set forth in the foregoing motion for leave to file this brief.[1]

The Ninth Circuit's decision in this case conflicts with *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985), and *Pilot Life Ins. Co. v. Dedeaux*, 471 U.S. 41, 48-50 (1987), because, without analysis or explanation, it applies a common law doctrine of general application as if it were a law specifically directed at the insurance industry. The result is to invalidate ERISA benefit plan rules requiring the timely submission of claims and to complicate the administration and expense of such plans, to the ultimate detriment of the plans and their participants.

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[1] Pursuant to Rule 37.6, *amicus* ACLHIC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief. Respondent has not consented.

REASONS FOR GRANTING THE PETITION

I. "Notice-Prejudice" is a Rule of General Application.

In this action, the Ninth Circuit held that California's common law notice-prejudice rule is within the scope of ERISA preemption as a state law which "related to" an employee benefit plan. ERISA Section 514(a), 29 U.S.C. Section 1144(a). The Ninth Circuit erred, however, in its conclusion that the notice-prejudice rule is a state law regulating insurance which could be "saved" from ERISA preemption under ERISA Section 514(b)(2)(a), 29 U.S.C. Section 1144(b)(2)(a). In this decision, the Ninth Circuit followed its earlier and similarly erroneous decision in *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998).

In *Cisneros*, the Ninth Circuit analyzed *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985), and *Pilot Life Ins. Co. v. Dedeaux*, 471 U.S. 41, 48-50 (1987), to the effect that state laws are saved from ERISA preemption if the law is "specifically directed" at the insurance industry and if it "regulates insurance", *Cisneros*, 134 F.3d at 944-945.

The Ninth Circuit failed, however, correctly to apply the common sense test of *Dedeaux* that such a law must be "specifically directed" at the insurance industry. On the contrary, the notice-prejudice rule is one of common application to a wide variety of situations and entities. The broadest expression of this commonplace doctrine may be found in the Restatement of the Law Second, Contracts 2d, Section 229, as follows:

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Indeed, the requirement that prejudice must result before a failure to perform a contractual condition or to give a required notice will work a forfeiture is commonplace in the law of California. See *People v. Carrera*, 49 Cal.3d 291, 261 Cal.Rptr. 348 (1989) (failure to give notice of testimony in aggravation of a capital murder sentence harmless where defendant was not prejudiced by lack of notice); *Conservatorship of Rand*, 49 Cal.App.4th 835, 57 Cal.Rptr.2d 119 (1996) (failure to give notice of citation to proposed conservatee harmless where no prejudice resulted); *People v. Howard*, 44 Cal.3d 375, 243 Cal.Rptr. 842 (1988) (untimely notice of evidence to be used in penalty phase of capital murder prosecution harmless where no prejudice shown); *In Re David C.*, 152 Cal.App.3d 1189, 20 Cal.Rptr. 115 (1984) (failure to give adequate notice of termination of custody of minor child harmless where no prejudice shown); *Industrial Asphalt v. Garrett Corp.*, 180 Cal.App.3d 1001, 226 Cal.Rptr. 17 (1986) (failure to serve statutory notice of mechanic's lien claim effective to defeat lien where no prejudice resulted).

Indeed, if anything, notice-prejudice is merely a subspecies of the broader doctrine of harmless error: in every manner of case and circumstance, excepting only jurisdictional delays, courts disregard irregularities and informalities which do not result in substantial prejudice. Thus, the failure timely to post jury fees is regularly excused where no prejudice is proven. *Johnson-Stovall v.*

Superior Court, 17 Cal.App.4th 808, 21 Cal.Rptr.2d 494 (1993). Failure to give proper and advisable jury instructions concerning criminal negligence is ignored where the failure to do so would not have prejudiced the defendant given a jury finding of guilt of first degree pre-meditated and deliberate murder. *People v. Mayfield*, 14 Cal.4th 668, 60 Cal.Rptr.2d 1 (1997). The failure to make timely service of a civil action has likewise been excused absent a finding of prejudice. *Putman v. Clague*, 3 Cal.App.4th 542, 5 Cal.Rptr.2d 25 (1992). Likewise, informalities in the proof of service of documents is ineffective where actual service occurred and no prejudice resulted. *Lum v. Mission Inn Foundation, Inc.*, 180 Cal.App.3d 967, 226 Cal.Rptr. 22 (1986).

This Court, too, has applied the notice-prejudice rule, and in contexts far removed from the insurance industry. *Pioneer Investment Services v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489 (1993) (tardy filing of bankruptcy proofs of claim excused where debtor was not prejudiced by delay). See also *Jersey Shore State Bank v. U.S.*, 479 U.S. 442, 107 S.Ct. 782, 93 L.Ed.2d 800 (1986) (third party lender not unfairly prejudiced by government failure to give notice of tax claim).

In *Cisneros*, the only authority cited by the Ninth Circuit for the conclusion that the notice-prejudice rule is directed specifically at the insurance industry and is applicable only to insurance contracts is *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). *Dedeaux*, of course, only sets forth the standard that to be regarded as a law which regulates insurance, a law must not only have an impact on the insurance industry but must be specifically

directed toward that industry. The Ninth Circuit failed, however, to pursue the analysis of *Dedeaux* into the history of the doctrine in question, which was in *Dedeaux* the availability of punitive damages under Mississippi law. In that analysis, the Court concluded that:

> Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law. 481 U.S. 41 at 50.

The same is true here. The doctrine of excuse of minor breach, termed the notice-prejudice rule, has in some cases been identified with the insurance industry and applied to it in some cases. But the Ninth Circuit did not attempt, nor could it, to show that the common law doctrine to excuse minor, non-prejudicial contract breaches is one specifically directed toward that industry.

It is true that cases applying the notice-prejudice doctrine to the insurance industry may be found and are cited in the Ninth Circuit opinion in *Cisneros* (*Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 15 Cal.Rptr.2d 815, 845 (1993); and *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 151 Cal.Rptr. 285, 587 P.2d 1098, 1106-1107 (1978)). But citing instances where a rule of general applicability has been applied to a given industry does not make that rule specifically directed at that

industry any more than the application of punitive damage concepts to an insurer in Mississippi made the punitive damage law of Mississippi one directed specifically at the insurance industry.

II. The Issue Presented is of Substantial Significance

The Ninth Circuit decision will result in disparate state by state rulings on topics far beyond notice-prejudice. Any common law doctrine applied to the insurance industry may become the subject of the same Ninth Circuit analysis or lack thereof. The inevitable result will be the "patchwork scheme of regulation" which ERISA's broad preemption provision was enacted to eliminate. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987). Instead of attaining the manifest goal of increased efficiency and reduced costs, plans and plan administrators will be required to pay late claims and, more importantly, to administer plans separately according to the law of each state. This will in turn reduce the affordability of benefit plans and increase the likelihood that benefits will be withdrawn or not offered at all.

CONCLUSION

In enacting ERISA, Congress intended to encourage the provision of benefits in a cost-effective and efficient manner. Granting the petition and reversing the Ninth Circuit's decision will advance the goals of Congress by maintaining the efficiency of nation-wide standards for plan administration and the preservation of the availability of plan benefits for plan beneficiaries.

Respectfully submitted,

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